

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL
77-4033

United States Court of Appeals

For the Second Circuit.

HUDSON TRANSIT LINES, Inc.,
Petitioner,
against

INTERSTATE COMMERCE COMMISSION, UNITED
STATES OF AMERICA and MONSEY TRANSPORTATION CORP.,
Respondents,

ROCKLAND COACHES, Inc.,
Intervenor.

ON PETITION FOR REVIEW OF ORDER OF THE INTERSTATE
COMMERCE COMMISSION.

**BRIEF FOR MONSEY TRANSPORTATION CORP.,
RESPONDENT.**

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(1514)

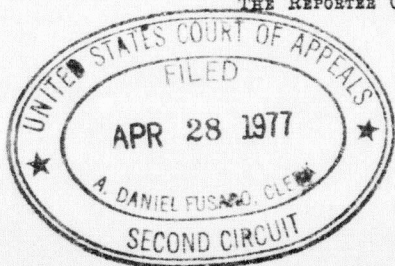


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BRIEF FOR MONSEY TRANSPORTATION CORP., RESPONDENT.

PRELIMINARY STATEMENT.

The crux of Petitioner's position is that the transportation service to be provided by the Applicant constitutes contract carriage as the same is defined by the statute (Sec. 203 [a] [15] of the Interstate Commerce Act, 49 U. S. C. 303 [a] 15), wherefore the grant of common carriage, albeit in special and charter operations over irregular routes, evidenced by the Certificate of Public Convenience and Necessity issued to the Applicant (Item 39, Certified Index Supplement, App. I, *infra*), was contrary to the evidence and an arbitrary, capricious contravention of the applicable law, notwithstanding that

the service to be provided pursuant to the orders under review would of necessity have to be operated in observance of and compliance with the obligations imposed by law on the form of carriage authorized.

To be sure, the authority as originally sought by the Applicant was for a permit to operate over irregular routes under continuing contracts with Jewish Orthodox Congregations and Yeshivas located in Monsey, New York, for the exclusive benefit of the members of said Congregations and Yeshivas. This was the operation described in a stipulation agreed upon by the parties, including this Petitioner and other Protestants (Ex. 1 to the Transcript, R. 141), accepted by the Administrative Law Judge and read into the record (R. 106-107).

Nevertheless, as will be hereinafter demonstrated, rather than resulting from an absence of supporting evidence, as claimed by Petitioner, the grant of common carriage was generated by the very evidence presented in support of the application which established that the service as authorized by Review Board Number 2 was the appropriate form of carriage, even though the application was for a permit as a contract carrier. This alternation of one form of authority for another on the evidence presented in support of the application is expressly provided for and within the contemplation of Item IX of the application (R. 14) which reads:

"If the evidence presented in support of this application, shows that Applicant, although applying for a certificate as a common carrier, would be entitled to a permit as a contract carrier, or, if applying for a permit, would be entitled to a certificate, Applicant agrees that the application may be considered to be for the appropriate form of authority."

Petitioner, as well as the other Protestants, having been participants in the proceedings on the application before the Administrative Law Judge, were chargeable with notice and knowledge of Item IX. Yet they took no exception thereto, and withdrew their protests without reservation as to Item IX.

It was in this posture of the matter, therefore, that the orders under review were made, particularly when none of the evidence was controverted or even disputed in any respect, either by Petitioner or any other Protestant, nor was any exception taken to the statement of facts of the Administrative Law Judge or to his findings of consistency with the public interest and national transportation policy (R. 8-10).

By the same token, and in the same posture of the matter, the ultimate question on this petition for review is not, as urged by Petitioner, whether the evidence

supported transportation as a common carrier per se of the public-at-large, but whether the uncontroverted evidence substantially supported common carriage over irregular routes between Monsey and points in New York City in special and charter operations, in fact the appropriate form of authority within the purview of Item IX of the application.

This Respondent respectfully submits that on the law and the facts, the question must be answered in the affirmative and the orders under review must be sustained by this Court on the very authorities cited by Petitioner for the rules governing the scope of judicial review applicable herein (Brief of Petitioner, pp. 17-18).

POINT I.

THE RECORD SUBSTANTIATES THE AUTHORITY GRANTED.

A. The probative evidence at the Hearing.

In summary, according to the testimony (R. 101-148), Monsey, New York is a community about 22 miles from New York City, predominantly inhabited by some 2500 Orthodox Jewish families with a birth rate of 4.5, i.e., three times the U. S. average, who constitute virtually the entire population of the hamlet.

While the majority of these Orthodox Jewish families are members of the Hassidic Sect, all of them, Hassidim

and non-Hassidim alike, strictly observe the daily religious practices enjoined upon all Orthodox Jews. These daily practices, *inter alia*, require the recitation of individual prayers at certain hours, the preservation of the sanctity of the Sabbath, and avoidance of unsanctioned physical contact between males and females.

For the foregoing reasons, separate seating of men and women, as well as separate space for prayer, are special needs for Orthodox Jews riding in a bus or other conveyance even while in transit. Riding after the onset of the Sabbath time being forbidden, the hours of operation on Fridays need also to be adapted to their special needs.

Currently, there exist in Monsey about 32 Orthodox Jewish Congregations plus a considerable number of Yeshivas (schools of religious study). Per year, three or four new Congregations are formed, usually beginning with 12 or 13 members (only a quorum of 10 males is required to form a Congregation). New Yeshivas are also continually formed, usually beginning with about 50 members. The largest Congregation in Monsey currently has 250 members, the smallest about 30.

Existing carriers have declined to provide a service that will accommodate the special needs of the Orthodox Jews of Monsey. Moreover, none of the regular bus companies operate out of Monsey itself. All of them are at

least two or three miles away. To reach the nearest station of the regular bus companies, therefore, the inhabitants of Monsey must walk or find some private means of transportation.

The kind of work suited to their skills not being readily available in Rockland County, the Monsey Jews find employment in New York City. In the absence of regular bus service, these inhabitants of Monsey are obliged to travel to their work in New York City by means of car pools, Congregational mini-buses or vans, and taxis. Resort to these makeshift modes of transportation, which are expensive, tardy and unreliable, is unavoidable because of the conditions prevailing.

The Applicant sought to provide a non-stop service operating directly out of Monsey to New York City and return, under contracts with various Orthodox organizations of the community for the benefit of their membership. As desired, separate seating of men and women, as well as special seating for prayers and study, would be provided aboard the buses. Hours of operation would accommodate the work-hours of the riders, who would be returned to Monsey on Fridays several hours prior to the commencement of the Sabbath at sundown.

B. *The initial decision by the Administrative Law Judge (R. 8-10, App. II, infra).*

On the testimony hereinabove summarized, the following facts were found and conclusions made, to which no exception was taken:

a) Applicant will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the Orthodox Jewish community residing in the unincorporated hamlet of Monsey, who constitute nearly the entire population thereof.

b) These people absolutely require a bus service to and from their places of employment in New York City that will be consistent with their own distinct religious beliefs and customs, such as the fact that the sexes insist upon being segregated on the bus, and the fact that all passengers must return to their homes before sundown on Friday and will not ride on Friday evening or Saturday.

c) These practices are so incompatible with the normal bus operations of existing common carriers that said carriers have declined to provide such a service, forcing hundreds of inhabitants of Monsey to resort to extraordinary measures to get to and from work.

d) Existing carriers would be unaffected by a grant of authority, whilst a denial would be harmful to

the prospective passengers and would result in substitute methods of transportation that are less effective and more wasteful of fuel.

e) It would not be feasible, and indeed would be onerously burdensome, to require that specific contracting organizations be named in a permit, since very small groups (as small as ten persons) are constantly being formed or merged, and the cost of obtaining new authority to accommodate each new small group, as it formed, would be prohibitive.

f) The total number of contracting organizations could reach a substantial figure.

g) The service would be consistent with the public interest and the national transportation policy, and the proceeding was not a major Federal action having a significant effect upon the human environment.

C. *The findings by Review Board Number 2 (R. 5-6, App. III, infra).*

The statement of facts and findings of the Administrative Law Judge were expressly affirmed and adopted by Review Board Number 2 (App. III, *infra*). Indeed, it was because the evidence established these facts that the recommended authority was modified from contract carriage to common carriage over *irregular* routes in *special* and *charter* operations. Thus, since the testimony adduced at

the hearing indicated that there exist more than 32 of the described Congregations in the Monsey area as well as an undetermined number of Yeshivas or religious schools, and any contract or contracts would be with an unlimited number of unnamed Jewish Orthodox Congregations or Yeshivas, the Review Board concluded as follows:

"* * * That if applicant were to enter into contracts for transportation services with each of these organizations and performed operations thereunder, it could not be considered as engaging in transportation for a limited number of persons as specified in the contract carrier definition of section 203(a) (15) of the Interstate Commerce Act; that the operations proposed by applicant and *shown to be required by the supporting witnesses* may be described more appropriately in terms of motor common carrier special and charter operations; that the record amply shows the latter service to be required by the public convenience and necessity; and that said authority will be granted in lieu of the contract carriage recommended by the Administrative Law Judge * * *." (Italics supplied.)

Finally, the Review Board "felt constrained to emphasize" that:

"* * * Our authorization of the proposed service is based solely on applicant's willingness, and existing carriers' apparent inability or unwillingness, to respond to the specialized needs of that segment of the public represented by the supporting witnesses; that no preferential treatment based on religious or ethnic factors is conferred or intended by our grant of authority herein, and that the Commission has stated that where existing carriers are not providing adequate service to any particular segment of the public, a grant of authority to cure this defect does not evince a discriminatory policy but is, indeed, an award to provide a needed service, cf. *Elegante Tours, Inc. - Broker Application*, 113 M. C. C. 156, 160 (1971)."

POINT II.

THE APPEAL IS GROUNDLESS.

The service authorized, namely, special and charter operations over irregular routes, has wholly superseded the service originally applied for, namely, operation as

a contract carrier. Therefore, for Petitioner to postulate now that the service to be provided by Applicant nevertheless will be an exclusively contract operation rests on Petitioner's gratuitous assumption of an intent on the part of Applicant contrary to fact.

Applicant has agreed, per Item IX of the application, to operate as a common carrier in special and charter operations over irregular routes. Therefore, Applicant has agreed that it will have the obligation, in its special operations, to carry *any and all* inhabitants of Monsey, and may not limit its service to contracting organizations as it could have done were it to operate as a contract carrier. Thus, the authority granted imposes more stringent regulation than would have been the case if mere contract carriage had been authorized. It is the same as to charter operations, the obligations of which entail regulation different from that applicable to contract carriage. By reason of the foregoing, Petitioner mis-states the facts of the case when it claims that Applicant will serve only contracting organizations while holding itself out as a common carrier, when in actual fact such a limitation of its operations is not available to Applicant under the authority granted.

The so-called "general public" which Petitioner postulates as the public which Applicant must serve under

the authority granted is not the public-at-large, but a public comprised only of the inhabitants of Monsey, to which the Applicant is restricted as the beginning and ending point of its irregular routes. That Orthodox Jews happen to comprise virtually the entire population of Monsey does not alter the fact that this is the public, and the only public, which the Applicant has the obligation to serve in both its special and its charter operations. Hence, even if all the riders from Monsey are Orthodox Jews, they still constitute the obligatory public for the authorized special and charter operations to whom the Applicant will be entitled to hold itself out as a common carrier.

No exception was taken by Petitioner to the facts found on the evidence by the Administrative Law Judge, affirmed and adopted by Review Board Number 2, that (1) existing carriers were unable or unwilling to meet the special needs of the Monsey community; (2) the regular bus companies operate not out of Monsey but from points at least two or three miles away; and (3) because of these prevailing conditions, hundreds of Monsey inhabitants are forced to resort to extraordinary measures to get to and from work. Hence, not having taken exception to these findings of fact, Petitioner cannot now postulate that

these facts, found on the evidence presented in support of the application, were insufficient to support the findings of public convenience and necessity.

Finally, Petitioner took no exception to the facts found on the evidence that there exist in Monsey more than 32 Congregations, plus an undetermined number of Yeshivas, with whom Applicant would have been in a position to contract if it were to operate as a contract carrier. Hence, not having taken exception to these findings of fact, Petitioner cannot now postulate that a grant of contract carriage nevertheless would still be within the "limited number of persons" specified in the contract carrier definition of Section 203(a) (15) of the Interstate Commerce Act (49 U. S. C. 303 [a] 15).

Neither the legislative history of the statute, nor the precedents relied on by Petitioner, support its postulate that in the instant case the proper form of authority is contract carriage. Thus, common carriage was upheld where the carrier had 46 contracts (*Storch Trucking Company, Inc., Conversion Proceeding*, 82 M. C. C. 777, 781); where the carrier had contracts with more than six or eight persons (*Umtuhn Trucking Co. - Extension-Phosphatic Feed Supplements*, 91 M. C. C. 691); where the service was for the transportation of a unique type of commodity (e.g. explosives, cast iron pipes) over irregular

routes (*Ashworth Transfer, Inc., Gregory Heavy Haulers, 73 M. C. C. 437*); where the service was not limited to particular individual shippers but was provided to all in a single class of shippers served (*Armored Carrier Corp. Extension, 92 M. C. C. 336*).

The precedents for contract carriage relied on by Petitioner are wholly distinguishable from the instant case and are contrary to the proposition for which Petitioner cites them. Thus, in *S. Klein Trucking*, the carrier served only its own subsidiary corporations constituting its own infra-structure, while in *Lane & Kaplan* and *Howell Trucking*, the unique commodity was transported for a single class of limited size. As for *Del-Val Coach*, that case involved but four named shippers, so that the service for the benefit of the numerous tenants was well within the statutory definition of a "limited number of persons." Similarly, in *Crete*, only four named shippers were involved.

Square authority for the instant case is to be found in *Vaughn O. Gallup Extension - Fertilizer, 73 M. C. C. 433*. In that case, the applicant sought authority as a motor common carrier over irregular routes. Other rail and motor carriers opposed on the grounds that no necessity was proved, that the shipper was attempting to avoid existing rate considerations, and that existing carriers

should have the opportunity to provide the service before new operations were authorized. However, the applicant showed that the existing services were inadequate, and that the existing carriers had failed to provide fertilizer rates, thereby creating a virtual embargo, because they were reluctant to carry the commodity. Further, the applicant showed that most of the consignees were located at off-rail points and would not accept rail shipments because of additional delivery charges, that time in transit was important to coordinate with the time of crop-planting, and that despite "token" offers to the shipper by the existing carriers, they were unable or unwilling to meet the special needs of the shipper and the consignees. On these facts, it was held that present and future public convenience and necessity required operation by the applicant as a common carrier of fertilizer over irregular routes from Massachusetts to Maine.

The analogy between the facts of *Vaughn* and the facts in the instant case is clear and compelling. The more is this so when it is considered that the passengers involved herein have the right to claim First Amendment protection for their special needs. Moreover, the claim of sex discrimination is specious because the segregation of men and women is the voluntary mode of the riders and in any event, commingling of male and female

riders, where indicated, can be readily provided for by other means. Accommodation of the needs and desires of riders, be it in regard to their religious practices or in regard to other amenities designed to promote their comfort while in transit, cannot be transmogrified into unlawful discrimination as long as any and all inhabitants of Monsey are served by the Applicant in accordance with its obligation under the service authorized.

CONCLUSION.

The petition for review should be dismissed and the orders sustained.

Respectfully submitted,

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212-732-0970.

APPENDIX I.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY C-15.1

NO. MC 147 3*

SERVICE DATE
MARCH 15, 1977MONSEY TRANS
SPRINGCORP.,
NEW YORK

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1,
held at its office in Washington, D. C., on the 15th day of
March, 1977.

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Passengers and their baggage, in the same vehicle with passengers, in special and charter operations;

Beginning and ending at Monsey, N. Y., and extending to points in New York and Kings Counties, N. Y.

By the Commission, division 1.

ROBERT L. OSWALD,
Secretary

(SEAL)

*Application originally was filed for contract carrier authority; but pursuant to order of the Commission dated June 22, 1976, the operations were found to be those of a common carrier and issuance of a certificate was authorized herein and No..MC 141113 was assigned to said proceedings.

APPENDIX II.

OH

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

SERVICE DATE

MAY 10 1976

No. MC-141113

MONSEY TRANSPORTATION CORP., CONTRACT CARRIER APPLICATION

Authority granted to applicant as a contract carrier of passengers
between New York, N. Y., and Monsey, N. Y., subject to conditions.

Harvey L. Strelzin, for applicant.

S. S. Eisen, Frank J. Fitzsimmons, and Samuel B. Zinder, for protestants.

By J. Lee Benice, Administrative Law Judge:

By application filed July 3, 1975, as amended, Monsey Transportation Corp., of Spring Valley, N. Y., seeks authority (as described more precisely in the findings below) as a contract carrier of passengers over irregular routes, between the unincorporated community of Monsey, N. Y., on the one hand, and certain specific locations in New York City, on the other.

A public hearing has been held at which three common carrier protestants (Hudson Transit Lines, Inc., Rockland Coaches, Inc., and Transport of New Jersey) initially appeared in opposition. However, all subsequently withdrew from the hearing.

STATEMENT OF FACTS

The evidence shows that applicant will provide a unique and highly specialized service designed to meet the peculiar transportation needs of the Orthodox Jewish Community residing in the unincorporated hamlet of Monsey. These people constitute nearly the entire population of Monsey, and they absolutely require a bus service to and from their places of employment in New York City that will be consistent with their own distinctive religious beliefs and customs (such as, for example, the fact that the sexes insist upon being segregated on the bus, and the fact that all passengers must be returned to their homes before sundown on Friday and will not ride on Friday evening or Saturday), practices which are so incompatible with common carriage and with the normal bus operations of existing carriers that such carriers have declined to provide such a service, forcing hundreds of inhabitants of Monsey to resort to extraordinary measures to get to and from work.

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The evidence further shows that the proposed operation would be almost perfectly balanced and would be economically feasible; that applicant is fit, willing, able, and uniquely qualified to provide such a service; that existing carriers would be unaffected by a grant of authority; that a denial would be harmful to the prospective passengers and would result in substitute methods of transportation that are less efficient and more wasteful of fuel.

DISCUSSION AND CONCLUSIONS

It is clear from the evidence that the application, as amended, should be granted in order to provide a much needed service, and that the manner in which the authority is described in the amended application and in the findings below will provide the greatest flexibility of service while retaining the essential character of contract carriage. The specific contracting organizations are not named. It would not be feasible, and, indeed, would be onerously burdensome to require that specific contracting organizations be named in the permit, since very small groups (as small as 10 persons) are continually being formed, or merged, and the cost of obtaining new authority to accommodate each new small group, as it formed, would be prohibitive. It should also be noted that the total number of contracting organizations could reach a substantial figure and thereby suggest to some (aware of the decision in Umthum Trucking Co. Ext. - Phosphatic Feed Supplements, 91 M.C.C. 691) that the operation had lost its character as a contract carriage operation. However, it is apparent from a close examination of the Umthum case (see Umthum, *supra*, at 696 and 697) and from a close examination of both the authority that will be granted and the nature of the operation that is to be conducted, that as long as the limitations in the permit are observed, the operation will necessarily retain the character of contract carriage and will be wholly irreconcilable with common carriage.

The authority to be granted will result in a slight technical enlargement in the authority originally applied for. Accordingly, notice of the grant of authority will be published in the Federal Register in order to apprise parties who theoretically might be affected by any enlargement of the application.

FINDINGS AND ORDER

I find that operation by applicant as a contract carrier of passengers by motor vehicle in interstate and foreign commerce, over irregular routes, transporting passengers and their baggage in the same vehicle with passengers, between that area in Monsey, N. Y., bounded on the north by Viola Road, on the east by State Highway 306, from Viola Road to Kearsing Parkway to the western boundary of the village of Spring Valley, on the south by State Highway 59, and on the west by College Road, on the one hand, and, on the other, (1) 46th to 47th Streets and 6th Avenue, Manhattan, N. Y.; (2) 34th

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Street and 5th Avenue, Manhattan, N. Y.; (3) Broadway and Houston Street, Manhattan, N. Y.; (4) Lee Avenue and Rodney Street, Brooklyn, N. Y.; and (5) 49th Street and 13th Avenue, Brooklyn, N. Y.; under continuing contracts with Jewish orthodox congregations and yeshivas located in the described Monsey area; with transportation restricted to members of said congregations and yeshivas; will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able to provide the proposed service and conform to the requirements of the Interstate Commerce Act and the Commission's Rules and Regulations thereunder; that this proceeding is not a major Federal action having a significant effect upon the human environment; that an appropriate permit should be issued; and that the application in all other respects should be denied. Accordingly,

It is ORDERED, that the application, except to the extent granted herein, be, and it is hereby, denied;

It is FURTHER ORDERED, that upon compliance by applicant with the requirements of sections 215, 218, and 221(c) of the Interstate Commerce Act, and with the Commission's Rules and Regulations thereunder, and with the requirements established in Contracts of Contract Carriers, 1 M.C.C. 628, and subject to 30 days' prior publication in the Federal Register of a notice of the authority actually granted by this order, during which 30-day period any person prejudiced by lack of earlier notice may seek to intervene in this proceeding, a permit will be issued authorizing the operations described above;

And it is FURTHER ORDERED, that unless compliance is made by applicant with the requirements of sections 215, 218, and 221(c) of the act within 90 days after the date of the Federal Register publication described in the preceding paragraph, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

Dated at Washington, D. C., this 30th day of April, 1976.

By the Commission, *J. Lee Benice*, Administrative Law Judge.

ROBERT L. OSWALD,

(SEAL)

Secretary.

APPENDIX III.

[SERVICE DATE]

STAY DECISION AND ORDER

JUL 20 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 2, held at its office in Washington, D. C., on the 22nd day of June, 1976.

No. MC-141113

MONSEY TRANSPORTATION CORP. CONTRACT CARRIER APPLICATION
(Spring Valley, N.Y.)

Upon consideration of the application, as amended, and the record in the above-entitled proceeding, including the initial decision of the Administrative Law Judge; and

It appearing, That no exceptions were filed to the initial decision of the Administrative Law Judge, but that the taking effect of said decision was stayed by order of the Commission dated June 8, 1976, and served June 25, 1976;

It further appearing, That the Administrative Law Judge recommended that applicant be granted a permit authorizing the operation as described in the appendix to this order;

It further appearing, That although the proposed operation concerns the transportation of passengers between points in a single State (New York), the record indicates that applicant proposes to operate over the most feasible route between Monsey, N.Y., and New York, N.Y., which route encompasses portions of New Jersey; and that, therefore, the operation is in interstate commerce and is properly the subject of this application proceeding;

It further appearing, That the Administrative Law Judge's recommended grant of motor contract carrier authority to transport passengers between a described area in New York under a continuing contract or contracts with an unlimited number of unnamed "Jewish orthodox congregations or yeshivas" located in the named origin territory should be modified; that testimony adduced at hearing indicated that there exist more than 32 of the described congregations in the Monsey, N.Y., area as well as an undetermined number of yeshivas or religious schools; that if applicant were to enter into contracts for transportation services with each of these organizations and performed operations thereunder, it could not be considered as engaging in transportation for a "limited number of persons" as specified in the contract carrier definition of section 203(a)(15) of the Interstate Commerce Act; that the operations proposed by applicant and shown to be required by the supporting witnesses may be described more appropriately in terms of motor common carrier special and charter operations; that the record amply shows the latter service to be required by the public convenience and necessity; and that said authority will be granted in lieu of the contract carriage recommended by the Administrative Law Judge;

It further appearing, That the territorial description used by the Administrative Law Judge in his recommended grant of authority is extremely narrow; that the said territorial description is also administratively unfeasible, unduly restrictive, and difficult to enforce; and that the description in question will therefore be modified as indicated in the appendix;

It further appearing, That we feel constrained to emphasize that our authorization of the proposed service is based solely on applicant's willingness, and existing carriers' apparent inability or unwillingness, to respond to the specialized needs of that segment of the public represented by the supporting witnesses; that no preferential treatment based on religious or ethnic factors is conferred or intended by our grant of authority herein; and that the Commission has stated that where existing carriers are not providing an adequate service to any particular segments of the public, a grant of authority to cure this defect does not evince a discriminatory policy but is, instead, an award designed to provide a needed service, cf. Elegante Tours, Inc. - Broker Application, 113 M.C.C. 156, 160 (1971);

It further appearing, That inasmuch as the authority granted herein is somewhat broader than that originally sought and that recommended by the Administrative Law Judge, and because it is possible that other parties, who have relied upon the notice of the application as published, may have an interest in and would be prejudiced by the lack of proper notice of the authority described in the appendix to this order, a notice of the authority actually granted will be published in the Federal Register and issuance of a certificate in this proceeding will be withheld for a period of 30 days from the date of such publication, during which period any proper party in interest may file an appropriate petition for leave to intervene in this proceeding setting forth in detail the precise manner in which it has been so prejudiced;

And it further appearing, That modification of the Administrative Law Judge's findings is not of such nature as to require the issuance of a report discussing the evidence in light thereof;

Wherefore, and good cause appearing therefor:

We find, That applicant has failed to establish that it is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, as defined in section 203(a)(15) of the Interstate Commerce Act and to conform to the provisions of part II of the Act and the lawful requirements, rules and regulations thereunder; and that, therefore, section 209(b) of the Act requires that the contract carrier application be denied.

We further find, That viewing the substance of the application, the proposed service is actually that of a common carrier by motor vehicle; that the present and future public convenience and necessity require operation by applicant of the service described in the appendix hereto; that an appropriate certificate should be granted and that the application in all other respects should be denied.

We further find, That the findings of the Administrative Law Judge should be, and they are hereby, modified to reflect the grant of authority described in the appendix hereto.

And we further find, That the statement of facts and findings of the Administrative Law Judge, as modified herein, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That said application, except to the extent granted herein, be, and it is hereby, denied.

No. MC-141113

It is further ordered, That upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and with the Commission's rules and regulations thereunder, within the time specified in the next succeeding paragraph, an appropriate certificate be issued, subject to prior publication in the Federal Register of a notice of the authority actually granted by this decision and order.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made herein shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Review Board Number 2, Members Boyle, Eaton, and Liberman. (Board Member Boyle not participating.)

(SEAL)

ROBERT L. OSWALD,
Secretary.

APPENDIX

SERVICE RECOMMENDED:

Operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of passengers and their baggage in the same vehicle with passengers, between that area in Monsey, N.Y., bounded on the north by Viola Road, on the east by State Highway 306 from Viola Road to Kearsing Parkway to the western boundary of the village of Spring Valley, on the south by State Highway 59, and on the west by College Road, on the one hand, and, on the other, (1) 46th to 47th Streets and 6th Avenue, Manhattan, N.Y.; (2) 34th Street and 5th Avenue, Manhattan, N.Y.; (3) Broadway and Houston Street, Manhattan, N.Y.; (4) Lee Avenue and Rodney Street, Brooklyn, N.Y.; and (5) 49th Street and 13th Avenue, Brooklyn, N.Y., under continuing contracts with Jewish Orthodox congregations and yeshivas located in the described Monsey area, with transportation restricted to members of said congregations and yeshivas.

SERVICE AUTHORIZED:

Operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of passengers and their baggage in the same vehicle with passengers, in special and charter operations, beginning and ending at Monsey, N.Y., and extending to points in New York and Kings Counties, N.Y.

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Samuel B. Zinder, I. C., Attorney at Law;
Kenneth P. Kolson, Esq., Attorney at Law, and
Andrea Limmer, Attorney at Law,

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William Finch

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this 27th day of April, 1977.

Joan W. Clapperton
Notary Public

JOAN W. CLAPPERTON

NOTARY PUBLIC

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COMMISSION EXPIRES MAR. 30, 1978